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No. 82-256

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

THE PEOPLE OF THE STATE OF MICHIGAN
Petitioner

vs.

DAVID KERK LONG
Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

I. Whether the Michigan Supreme Court correctly decided that a warrantless search of a traffic violator's car violated the state and federal Constitutions.

II. Whether the Michigan Supreme Court correctly decided that evidence discovered in a search undertaken because of evidence obtained by unlawful police action should have been suppressed.

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STATEMENT OF FACTS

On August 25, 1977, two Barry County, Michigan, Sheriff's deputies pursued a speeding car, without activating their siren or emergency lights (10a-11a, 21a-23a, 75a-77a, 90a). The car soon swerved and stopped with its front in a shallow ditch, its back on the roadway and its passenger's side toward the deputies (10a-11a, 77a-78a, 90a-91a, 108a-110a). When the deputies activated their emergency lights, David Long, the car's only occupant, left the driver's seat and met the deputies by the trunk (11a-12a, 24a, 47a, 78a-79a, 90a-91a). Long appeared unsteady, disoriented and "under the influence of something" (25a-26a, 119a), but he was cooperative at all times (24a-25a, 120a). He produced his driver's license after being asked for it twice (11a, 47a-48a, 79a).

Long was asked twice for the car's registration and proof of insurance. Without speaking, he walked toward the open driver's door (11a, 48a, 79a). The deputies then retrieved a large, closed folding knife, one of many tools on the floor of the "messy" car (12a-13a, 26a-27a, 49a, 80a, 92a, 110-111a, 120a). No claim was made that the "buck" knife was contraband. Long was not charged with a weapons offense (43a, 97a; *People* v *Long*, 413 Mich 461, 469 n.1; 320 NW2d 866, 868 n.1 (1982). Long was frisked after the knife was seized. Although no weapons were found (12a-13a, 29a, 49a, 104a, 111a-112a), one of the deputies then held him while the other searched the interior of the car, ostensibly for weapons (12a-13a, 33a). The car's papers may have been found at this time (51a-52a). The deputies said they searched the interior of the car for weapons because they were going to permit Long to get in to retrieve the registration (35a), which they thought was in the glove box (41a). They acknowledged that no search would have been needed if they had asked Long where the registration was and retrieved it themselves (41a).

Although a hammer and screwdriver were among the tools scattered about the car (26a, 92a, 120a), the search for

weapons was concentrated on a leather object protruding slightly from beneath a folded-down armrest (13a, 81a-82a, 93a-94a, 121a). Deputy Howell lifted the armrest and removed a leather, pocket-sized wallet. He removed the wallet from the car and opened it, taking out a plastic bag containing marijuana (13a, 81a, 84a, 94a, 97a, 112a, 114a).

Long was arrested for possession of marijuana (14a, 84a). (He was later given a ticket for speeding which was eventually rescinded (42a-43a, 97a).) Deputy Howell then searched the car for other contraband (14a, 85a-86a). Long did not have a key to the trunk, so one deputy forced the keyless latch with his pocket knife. He found 75 pounds of marijuana (14a-16a, 19a-20a, 39a-40a, 85a-87a, 89a).

Deputy Howell searched the trunk looking for contraband and because he had a personal policy of checking for valuables in cars he intended to impound. He testified "we do not have an inventory search" in the Sheriff's Department (15a-17a).

The car was towed to the Sheriff's garage where it was left overnight with the marijuana in it (20a, 53a, 87a-88a, 116a-118a). No written inventory was produced at trial and the deputies could not testify precisely about the car's contents (27a, 92a, 120a).

Long moved to supress the marijuana found in the searches of the car. The prosecution never tried to justify these searches as "probable cause" or "incident to arrest" searches. *People* v *Long*, 413 Mich 461, 472, 481 n.2; 320 NW2d 866, 869-70, 873 n.2 (1982). It claimed the initial search of the vehicle was a protective search under *Terry* v *Ohio*, 392 US 1 (1968), and that the trunk search was an inventory search under *South Dakota* v *Opperman*, 428 US 364 (1976).

Long was convicted of possession of marijuana and appealed. His conviction was affirmed by the Michigan Court of Appeals. *People* v *Long*, 94 MichApp 338; 288 NW2d 629 (1979). The Michigan Supreme Court reversed,

saying the case did not come within the narrowly-drawn exceptions to the warrant requirements of the state and federal constitutions. *People* v *Long*, 413 Mich 461; 320 NW2d 866 (1982). Since the trunk search was made because of evidence found in the search of the car's interior, the evidence found in the trunk was suppressed as "fruit of the poisonous tree." *Wong Sun* v *US*, 371 US 471 (1963).

SUMMARY OF ARGUMENT

The limited, narrowly-construed exceptions to the Fourth Amendment's warrant requirement should not be expanded. There is no sound reason of public policy that would justify extending the rule of *New York* v *Belton*, 453 US 454 (1981) to protective searches. The reasons for permitting an extensive post-arrest search of the vicinity of a criminal defendant are not present in traffic stops or brief detentions on less than probable cause.

Expansion of *Terry* v *Ohio*, 392 US 1 (1968) would result in the scope of protective searches being broader than searches made incident to arrest. Expansion of the protective search rationale is not justified by the dangers of police work. The privacy interest in automobiles is significant and the Fourth Amendment's protections of automobiles ought not to be abandoned, or further diluted.

No compelling circumstance made the warrantless searches on less than probable cause necessary in this case. They were not valid *Terry* searches because Long had not given the deputies reason to believe that he was a danger to them. He was cooperative and not belligerent, aggressive or threatening in word or gesture.

A potentially dangerous, but ordinarily innocent, object in the vicinity of investigating officers is not alone reason to believe that a traffic violator nearby is dangerous. Many objects that can be lawfully possessed and are ordinarily present in automobiles could be used to injure investigating

officers. Extension of *Terry* to permit searches when those objects are present would, as a practical matter, make every traffic violator or *Terry* detainee in the vicinity of a car, subject to a search of his automobile without probable cause.

Cases cited by Petitioner and Amici in which protective searches of automobiles were upheld are distinguishable, either because the investigating officers in those cases had ample reason to believe the parties they were investigating were connected with a violent crime or because the defendants had been observed in the act of concealing objects in automobiles.

The "protective" search of Long's car was a pretext for a search for evidence. The deputies never testified they were in fear of bodily harm from Long, or that he had done anything to indicate that he presented a danger to them. They ignored a hammer, a screwdriver and other objects in the car which could have been used to injure them, while closely scrutinizing a billfold-sized leather object under an armrest on the front seat. At the time of their search, both deputies were between Long and the door. They would not have permitted him to gain re-entry to the car.

The Michigan Supreme Court never reached the question of whether the trunk search was a lawful inventory search. Under Michigan law, other possible justifications for the search could not have been raised in the Supreme Court because they were not raised below. This case presents an inappropriate vehicle for the Court to determine the issues raised here, but not reached below.

South Dakota v *Opperman*, 428 US 364 (1976) is inapposite. The Barry County Sheriff's Department had no inventory search procedure. No written inventory was ever prepared. The search was conducted in places other than where valuables are usually stored. The inventorying officer had an investigatory motive and the inventory was stopped when contraband was found.

There was no need to impound the car or to inventory it at the Sheriff's Department. Other arrangements could have been made for its removal from the side of the roadway or it could have been lawfully parked there. Absolutely safe and secure storage facilities were available and there was no reason to inventory the car because of risk of theft or intrusion by vandals.

Certiorari was improvidently granted. The decision of the Michigan Supreme Court rests on an adequate state law ground. Michigan Courts have consistently imposed a higher standard under the state constitutional provisions relating to search and seizure than this Court has imposed under the Fourth Amendment. The Court lacks jurisdiction to hear the case.

ARGUMENT

I. THE "STOP AND FRISK" EXCEPTION TO THE WARRANT REQUIREMENT SHOULD NOT BE EXTENDED.

A. The "stop and frisk" exception to the warrant requirement should not be extended as a matter of general policy.

1. *Exceptions to the warrant requirement are very limited.*

"[I]t is a cardinal principle that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.' " *Mincey* v *Arizona*, 437 US 385, 390 (1978), citing *Katz* v *US*, 389 US 347, 357 (1967).

"The exceptions [to the Warrant requirement] are 'jealously and carefully drawn,' and there must be 'a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative.'

'[T]he burden is on those seeking the exemption to show the need for it.' " *Coolidge* v *New Hampshire*, 403 US 443, 455 (1971).

Narrow construction of exceptions to the Fourth Amendment's warrant requirement is a fundamental principle of Fourth Amendment analysis. *Arkansas* v *Sanders*, 442 US 753, 759-760 (1979); *Vale* v *Louisiana*, 399 US 30, 34 (1970); *Jones* v *US*, 357 US 493, 499 (1958).

One of the most narrowly construed exceptions to the warrant requirement has been the "stop and frisk" exception of *Terry* v *Ohio*, 392 US 1 (1968).

Dunaway v *New York*, 442 US 200, 210 (1979) stressed the limited holding of *Terry*:

"Because *Terry* involved an exception to the general rule requiring probable cause, this Court has been careful to maintain its narrow scope."

Ybarra v *Illinois*, 444 US 85, 93 (1979) said:

"The *Terry* case created an exception to the requirement or probable cause, an exception whose 'narrow scope' this court 'has been careful to maintain.' "

2. Terry searches are limited in scope.

Dunaway v *New York*, 442 US 200, 210 (1979) said that *Terry*:

"defined a special category of Fourth Amendment 'seizures' so substantially less intrusive than arrests that the general rule requiring probable cause to make Fourth Amendment 'seizures' reasonable could be replaced by a balancing test."

See also *Michigan* v *Summers*, 452 US 692, 697-698 (1981).

"Nothing in *Terry* can be understood to allow a generalized 'cursory search for weapons' or, indeed,

any search whatever for anything but weapons." *Ybarra* v *Illinois*, 444 US 85, 93-94 (1979).

Against this background, Petitioner and Amici urge expansion of the *Terry* exception to permit police officers to make searches similar in scope to searches incident to arrest permissible under *New York* v *Belton*, 453 US 454 (1981).

3. The Belton rationale does not apply to Terry searches.

The presence of this case before the Court is another example of "the 'tendency of a principle to expand itself to the limit of its logic'—and perhaps beyond." *US* v *Borelli*, 336 F2d 376, 380 (2d Cir. 1964), cert den 379 US 960 (1965) (quoting Cardozo, Nature of Judicial Process, p. 51). Although a search incident to arrest serves different purposes than a *Terry* search, the Court is now urged to extend *Belton* to stops on less than probable cause.

A search incident to arrest serves two purposes: (1) "to remove any weapons that [the arrestee] might seek to use in order to resist arrest or effect his escape" and (2) "to prevent the concealment or destruction of evidence." *New York* v *Belton*, 453 US at 457.

A *Terry* search "is not justified by any need to prevent the disappearance or destruction of evidence of crime." *Terry* v *Ohio*, 392 US 1, 29 (1968). *Terry* does not allow "any search whatever for anything but weapons." *Ybarra* v *Illinois*, 444 US 85, 93 (1979).

In many cases an officer who has probable cause to make a custodial arrest will also have probable cause to believe that evidence of crime will be in a vehicle recently occupied by the defendant. A search for that evidence would be proper under *US* v *Ross*, 102 S Ct 2157 (1982). By definition, probable cause is lacking where *Terry* is the only justification for a warrantless search.

The need for an intense search of an arrestee for weapons may be justification for the adoption in *Belton* of what Justice Brennan correctly characterized as a fiction, i.e.:

> "that the interior of a car is *always* within the immediate control of an arrestee who has recently been in the car." *New York* v *Belton*, 453 US 454, 466 (1981). (Brennan, dissenting)

The *Terry* search fills a different need:

> "The need is only to find implements which could readily be grasped by the suspect during the brief face-to-face encounter, not to uncover items which are cleverly concealed and which could be brought out only with considerable delay and difficulty." 3 W. LaFave, Search and Seizure §9.4, p. 127 (1978).

A principal reason advanced for expanding *Terry* to permit car searches is that detainees will be permitted to return to their cars after the police have determined that no criminal activity is afoot or after a traffic citation has been issued. The lack of motive for escape or injury to the officer makes the hypothetical danger presented by a released *Terry* detainee or traffic violator seem unlikely.

> "[I]f a person is stopped for running a stop sign, it hardly seems plausible to suggest that after he is ticketed and returns to his car he will then seize a gun and try to overtake the police car and shoot the officers. And even if the stop concerned a suspicion of more serious conduct, such as because some of the occupants in the car were seen following a pedestrian, it does not seem likely that the suspects would have any motive to fire on the police if they are released from custody after those suspicions were not confirmed . . ." 3 W. LaFave, Search and Seizure §9.4, p. 137 (1978).

Application of the logic of *New York* v *Belton*, 453 US 454 (1981) would bring a certain summetry and simplicity to

search and seizure law. It is a symmetry not compelled by the logic of the Court's decisions.

> "Viewing similar facts from entirely different perspectives need not lead to identical results." *Robbins* v *California*, 453 US 420, 430 (1981). (Powell, concurring)

Extension of *Belton* to *Terry* searches would ignore the absence in this case of the considerations supporting the *Belton* rule while greatly restricting the privacy interests of citizens under the Fourth Amendment.

The Court should not bring the hindquarters of the camel into the tent simply because it let the animal get its nose under the flap in *Terry*.

4. Expansion of Terry will yield anomolous results.

Extension of *Terry* to permit warrantless searches of places detainees may go to after they are released would yield anomolous results.

If the police can search a car of a suspected traffic offender because the offender is to return to it, why should they not also be permitted to search the house of a pedestrian detained under *Terry* on his front doorstep. After his release, the detainee might walk through the front doorway and obtain a pistol concealed inside the house. The statistics cited to the Court by Amicus show that a significant number of officers killed in the line of duty are shot answering domestic disturbance calls.

If Officer McFadden had questioned Defendant Terry on the sidewalk in front of a bar, ought he not to have been permitted to search the bar for weapons on the theory that Terry might go there and obtain a weapon from a compatriot if he was released?

If the *Terry* search is expanded as Petitioner urges, then police will be able to undertake searches broader than those permissible as searches incident to arrest. Police cannot search the home of an arrestee taken into custody on his

front doorstep. *Vale* v *Louisiana*, 399 US 30, 35 (1970). The scope of a search incident to arrest made in a house cannot extend to the defendant's car in a driveway next to the house. *Coolidge* v *New Hampshire*, 403 US 443 (1971). *Ybarra* v *Illinois*, 444 US 85, 91 (1979) held that police cannot search occupants of a bar in the course of executing a search warrant on the premises. Presumably they could not search all occupants of a bar if they executed an arrest warrant in the bar or on the sidewalk outside it.

Terry authorizes the search of a person, not the places he has been or the places he might go to. If the Court yields to the urgings of Petitioner and Amici to expand the exception of the warrant requirement formulated in *Terry*, then the Court will have found "an exception that would swallow the general rule." *Michigan* v *Summers*, 452 US 692, 697 (1981).

5. The dangers of police work do not justify judicial repeal of the Fourth Amendment.

Petitioner and Amici effectively argue that police work remains as hazardous an occupation as it has always been. They cite distressing statistics demonstrating the hazards peace officers face in their contacts with the public, including their contacts with traffic law violators. However, it is one thing to decline "to accept the argument that traffic violations necessarily involve less danger to officers than other types of confrontations," *Pennsylvania* v *Mimms*, 434 US 106, 110 (1977). It is quite another thing to accept the argument that Fourth Amendment protections should be further diluted because investigation of traffic violations involves risk.

It has not been demonstrated that traffic stops are more hazardous than other contacts with the public. After all, saying that 30 percent of police shootings involve suspects in automobiles is another way of saying that 70 percent of police shootings involve suspects not in automobiles. Without knowing what percentage of police contacts with the

public involve traffic stops, it is impossible to say from the statistics presented whether traffic stops are more or less dangerous than other contacts.

Even if the decision in this case were one of legislative judgment rather than constitutional interpretation, it seems unlikely that the rule urged by Petitioner and Amici would significantly reduce the risk to police officers investigating traffic offenses. Thousands of traffic stops are made daily. Amicus acknowledges that "there is no way officers can identify in advance which suspects are likely to be dangerous." Brief of Gulf & Great Plains Legal Foundation, p. 9. The danger to the 30 percent of police officers killed in the line of duty *approaching* automobiles will not be lessened by authorizing warrantless searches of unoccupied cars of suspects who have left their cars and identified themselves to the police.

6. There is a significant privacy interest in automobiles.

It is suggested that a "diminished expectation of privacy" in automobiles is reason to justify their warrantless search on less than probable cause. The suggestion seems contrary to the holding of *Almeida-Sanchez* v *US*, 413 US 266, 269 (1973):

> "[that] the *Carroll* [v *United States*, 267 US 132 (1925)] doctrine does not declare a field day for the police in searching automobiles. Automobile or no automobile, there must be probable cause for the search."

Delaware v *Prouse*, 440 US 648, 663 (1979) rejected the notion that Fourth Amendment protections should be fewer for citizens in automobiles than for others, saying:

> "As *Terry* v *Ohio*, supra, recognized, people are not shorn of all Fourth Amendment protection when they step from their homes or to the public sidewalks. Nor are they shorn of those interests when they step from the sidewalks into their automobiles."

> "The word automobile is not a talisman in whose presence the Fourth Amendment fades away and disappears." *Coolidge* v *New Hampshire*, 403 US 443, 462 (1971).

US v *Ross*, 102 S Ct 2157, 2172 (1982) refused to draw a distinction between "worthy" and "unworthy" containers. The Court should resist the notion that the private contents of motor vehicles are less worthy of protection than other "effects" protected by the Fourth Amendment.

The diminished expectation of privacy in automobiles arises because the "configuration, use and regulation of automobiles" make them less likely to be "private" than other properties. *Arkansas* v *Sanders*, 442 US 753, 761 (1979).

The Court has noted that a car travels "public thoroughfares where both its occupants and its contents are in *plain view*." *Cardwell* v *Lewis*, 417 US 583, 590 (1974) (plurality opinion) (emphasis added). There are extensive regulations governing the condition and manner in which motor vehicles can be operated on public streets. *Cady* v *Dombrowski*, 413 US 433, 441 (1973). Automobiles periodically undergo official inspection and are occasionally taken into police custody. *South Dakota* v *Opperman*, 428 US 364, 368 (1976). In short, cars are sometimes not "private." However:

> "It hardly follows that from the fact that the police may examine the license plates and headlights of a person's car that he has a reduced expectation of privacy in the glove compartment or in the trunk of his car." Kamisar, Y., Recent Developments in Constitutional-Criminal Procedure, Michigan Institution of Continuing Legal Education, p. 9 (1982).

Reduced to its basics, the argument of Petitioner and Amici is that the Court has authorized so many exceptions to the warrant requirement regarding automobiles that creating one more won't hurt.

In his dissent in *Terry* v *Ohio*, 312 US 1, 39 (1968), Justice Douglas warned of the "powerful hydraulic pressures" which "bear heavily on the Court to water down constitutional guarantees." Those pressures are evidently still at work.

7. An automobile search is a serious intrusion on personal privacy.

The Government suggests an additional exception to the warrant requirement is reasonable because, in its view, rummaging through Long's personal effects was a less serious intrusion upon his Fourth Amendment rights than patting him down for weapons. There are two things wrong with the Government's analysis. First, no one asked Long which intrusion he regarded as more serious. Secondly, exceptions to the warrant requirement are not made based on the intrusiveness of the search authorized. They are made based on the need for the search in view of the exigencies involved. *Coolidge* v *New Hampshire*, 403 US 443, 479 (1971).

In *Terry* v *Ohio*, 392 US 1 (1968), the Court was at pains to point out that an invasion of privacy the police regard as trivial is often a matter of great indignity to the citizen intruded upon. The Government stands *Terry* on its head by arguing that because, in its view, the intrusion on Long's Fourth Amendment right "to be secure in . . . [his] effects" was less onerous than its invasion of his right "to be secure in [his] person," he has no cause to complain.

Terry did not set up a system for grading invasions of Fourth Amendment rights. It did not authorize trivial or even "moderate" violations of the consitution. *Terry* announced a limited exception to the warrant requirement, saying:

> "A search for weapons in the absence of probable cause to arrest, however, must, like any other search, be strictly circumscribed by the exigencies which justify its initiation." *Terry* v *Ohio*, 392 US 1, 25-26 (1968).

As will be discussed more fully below, there were no exigencies involved in this traffic stop which necessitated the search conducted.

The unsupported assumption that citizens will be happier about police searches of their personal effects than police searches of their persons is not a basis for further expanding the limited exception to the warrant requirement announced in *Terry*.

B. This case presents no reason for extension of the "stop and frisk" exception to the warrant requirement to automobiles near detainees.

1. Frisking Long was not justified under Terry.

"The constitutional validity of a warrantless search is pre-eminently the sort of question which can only be decided in the concrete factual context of the individual case." *Sibron* v *New York*, 392 US 40, 59 (1968).

There are no facts in this case which justify the search of Long or the car he was driving. Although the deputies found an object which might have been used as a weapon, they never testified that they thought Long was dangerous.

Before a *Terry* search may be made, there must be specific articulable facts to show not only that a detained citizen may be armed, but that he presents a *danger* to the police. 3 W. LaFave, Search and Seizure, §9.4, p. 114 n.17.

> "The police officer is not entitled to seize and search every person whom he sees on the street or of whom he makes inquiries. Before he places a hand on the person of a citizen in search of anything, he must have constitutionally adequate, reasonable grounds for doing so. In the case of a self-protective search for weapons, he must be able to point to particular facts from which he has reasonably inferred that the individual was armed and dangerous." *Sibron* v *New York*, 392 US 40, 64 (1968).

Long was cooperative at all times (24a, 120a). He never threatened the officers, either in word or gesture. He had not given the officers any cause to draw their weapons or to take him to the squad car (34a). He produced his license when asked (11a, 47a-48a, 79a). When told to stop and put his hands on the car, he complied (12a, 31a, 80a, 110a-111a). After he was told he was under arrest, Long gave the deputies the key to the car when asked (15a, 39a). Even after the knife was discovered in the car, the most serious offense the deputies wanted to investigate was speeding (30a-31a). The frisk of Long showed that he was unarmed (29a). The knife found in the car was closed when Deputy Lewis picked it up (49a, 80a, 110a-111a). Long was behind the rear wheel of the car with both deputies between him and the door after the knife was found (102a-104a). Although Petitioner and Amici have suggested that Long might have been charged with a laundry list of offenses, he was not charged with driving under the influence, public intoxication, reckless driving or any other offense. He was arrested for possession of marijuana and he was given an appearance ticket for speeding (42a, 43a, 97a).

One of the deputies did testify that he was "concerned" about Long (34a). Police officers are trained to be cautious and concerned about everyone they come in contact with. Brief of Amicus Gulf & Great Plains Legal Foundation, p. 9. When being questioned about his degree of concern, Deputy Howell testified: "I didn't completely ignore him." (34a) He *assumed* that Deputy Lewis was near Long (102a). The deputies felt it was unnecessary to handcuff Long immediately upon his arrest. That was not done until after he had given them the key they had asked for and the marijuana in the trunk had been found (20a).

A number of factors have been mentioned as possible justifications for a search of the car. The traffic stop was made in a relatively unpopulated rural area. It was nighttime. Long had been speeding. He had been involved in an accident. He acted like someone who had been in an

accident, i.e. confused and disoriented. He may have been intoxicated. His response to questions was slow. There was an object in plain view in the car he had left (a knife) which was lawful for him to possess but which might have been used in a way to injure the officer.

Many of these factors are involved in a great many traffic stops. There is nothing unusual about them and nothing to suggest any particular danger to the officer. The United States admits that most of them would not support a search of the car. Brief of Solicitor General, p. 12.

It would be hard to find a part of Barry County not rural and isolated. There is no reason to believe that Michiganders become more prone to violence after the sun goes down. Violations of traffic laws and accidents are common. They are not usually crimes associated with violence or the use of dangerous weapons. Driving under the influence of intoxicating liquor or drugs is, unfortunately, an everyday occurrence. (The deputies never seriously regarded Long as a drunk suspect. He was not given dexterity or sobriety tests or charged with drunk driving. There was no testimony showing that he looked intoxicated, i.e. that his eyes were bloodshot, his speech was slurred, etc. His confused behavior was as easily attributable to the fact that he had just been in an accident as it was to anything else.)

Since Long was cooperative, never threatened the deputies, and never made any effort or movement which suggested to them that he was going to hurt them, the only factor of significance to the automobile search is the presence of the closed buck knife in the car. That was the reason given for the search (12a).

2. The presence of a potentially dangerous, but legal, object in a car does not justify a Terry search.

If the presence of potentially dangerous objects near a motorist detained on a traffic violation is justification for a *Terry* search of his car, then every motorist stopped on the

highways of this nation will be subject to search. Nearly anything that can be transported in a car—and even the car itself—can be used to inflict harm.

People use cars to transport their personal effects, the tools of their trades, sporting equipment and a wide variety of objects that could be used as weapons. Coincidentally, Deputy Howell had a pocket knife the night of Long's arrest (16a, 86a). The car Long was driving had screwdrivers, hammers and other legal but potentially dangerous objects in it which Deputy Howell ignored in his search (26a, 92a, 121a).

The buck knife in this case was legal. See MCLA 750.227; MSA 28.424; *People* v *Iverson*, 34 MichApp 519 (1971). Ones like it are popular and used for many lawful purposes. Norman, G., *Blue-Chip Blades*, Esquire, August, 1980, at 40; Petzel, D., *Once Again, I * XL*, Mechanic's Illustrated, March, 1981, at 140; Murphy, B., *A Buster of a Folding Knife*, Mechanic's Illustrated, November, 1980, at 86; *Knife Know-How*, Mother Earth News, July/August, 1981, at 152.

The most commonplace items have been found to be deadly or dangerous weapons. *State* v *Belfiglio*, 134 SW 508 (Mo. 1911) (Steel screwdriver). *Fox* v *State*, 556 P2d 1281, 1284 (Ok. 1976) (hammer). *People* v *Russell*, 139 P2d 661, 663 (Cal. Ct. App. 1943) (fingernail file). *State* v *Lawson*, 227 SW2d 642, 644 (Mo. 1950) (rock). *People* v *Shaffran*, 243 Mich 527; NW 716 (1928) (stone). *Johnson* v *State*, 409 NE2d 699, 701 (Ind. Ct. App. 1980) (scissors). *State* v *Bustamonte*, 593 P2d 659 (Ariz. 1979) (scissors). *Bowers* v *People*, 617 P2d 560, 563 (Colo. 1980) (bottle). *State* v *Leak*, 306 So2d 737, 739 (La. 1975) (socket wrench handle). *People* v *Spagnola*, 260 NE2d 20, 28 (Ill. App. Ct. 1970) (billiard cue).

A flashlight, a broomstock, a cigarette lighter and a booted foot have all been found to be dangerous weapons in Michigan. *People* v *Buford*, 69 MichApp 27, 30; 244 NW2d 351 (1976).

In *People* v *Goolsby*, 284 Mich 375; 279 NW 867 (1938), the Defendant was stopped for a traffic offense. He got out of his car, returned to it and used the car to assault the officer. He was convicted of assault with a dangerous weapon.

Terry represented a significant departure from traditional Fourth Amendment analysis. *Dunaway* v *New York*, 442 US 200, 209-210 (1979). It was announced as a limited exception to the warrant requirement. It has repeatedly been referred to as an exception narrow in scope. If it is expanded to permit searches of motor vehicles of persons detained for traffic violations because the car, or the legal objects it contains, might be used to injure the officer, then there will be more exception than rule. Each of the thousands of people detained daily in this country for traffic violations will be subject to search, not incident to any arrest or based upon probable cause. The presence of a potentially dangerous object in the vicinity of a traffic offender cannot justify a warrantless search. There must also be a specific articulable reason to believe that the detainee is dangerous.

3. Cases which have permitted protective searches of automobiles are distinguishable.

Petitioner, Amici and the dissenters in the Michigan Supreme Court have cited cases in which courts have upheld warrantless searches of automobiles as protective searches permitted under *Terry* v *Ohio*, 392 US 1 (1968). The facts presented in those cases differ markedly from the situation that presented itself to Deputies Howell and Lewis.

When Deputies Howell and Lewis searched Long, they had no reason to believe that he had been involved in an on-going, violent feud of some kind. Cf. *US* v *Rainone*, 586 F2d 1132 (7th Cir. 1978), cert den 430 US 980 (1979), *US* v *Powless*, 546 F2d 792 (8th Cir.), cert den 430 US 910 (1977); *contra Louisiana* v *Greenwald*, 369 So2d 1317 (1979). They

had no reason to believe that Long was wanted on an outstanding warrant or in connection with a murder investigation. Cf. *State* v *Gilchrist*, 299 NW2d 913 (Minn. 1981); *US* v *Powless*, supra. They had no reason to believe that Long might have been planning, or had recently participated in, a robbery. Cf. *Brown* v *State*, 358 So2d 596 (Fla. Dist. Ct. App., 1978); *Uptegraft* v *State*, 621 P2d 5 (Ala. 1980); *US* v *Thomas*, 314 A2d 464 (DC, 1974). They had no reason to suspect that he had been involved in a recent shooting. Cf. *Williams* v *State*, 310 A2d 593 (Md. Ct. Spec. App., 1973); *Maine* v *Darling*, 393 A2d 530 (1978).

Long had not been observed making any furtive gestures as if he were concealing something when the officers approached. Cf. *Brown* v *State*, supra; *Commonwealth* v *Almeida*, 366 NE2d 756 (Mass. 1977); *State* v *Brown*, 389 A2d 507 (NJ Super. Ct. Law Div., 1978); *US* v *Green*, 456 F2d 620 (DC 1972); *US* v *Thomas*, 314 A2d 464 (DC, 1974); *contra Louisiana* v *Greenwald*, supra.

Long's case is more like *Canal Zone* v *Bender*, 573 F2d 1329 (5th Cir. 1978); *City of Portland* v *Poindexter*, 590 P2d 781 (Or. Ct. App. 1979); *Tyler* v *US*, 302 A2d 748 (DC, 1973); and *State* v *Gannaway*, 191 NW2d 555 (Minn., 1971). In each of those cases, courts have refused to permit a search of a traffic offender's car, where the only crime the officers suspected the defendant may be associated with was a traffic offense, even where the defendant was nervous or upset.

As a matter of Michigan law, Deputies Howell and Lewis could not have searched the car Long was driving simply because he was stopped for a traffic offense. *People* v *Zeigler*, 358 Mich 355; 100 NW2d 456 (1960); *People* v *Nelson Pitts*, 40 MichApp 567, 571-572; 199 NW2d 271, lv den 388 Mich 791 (1972); *People* v *Lee*, 371 Mich 563, 124 NW2d 736 (1963); *People* v *Ridgeway*, 74 MichApp 306, 312, 253 NW2d 743, lv den 401 Mich 831 (1977); *People* v *7th District Judge*, 55 MichApp 471, 476, 222 NW2d 778 (1974).

The evidence against Long could only be admitted if the search of his car was justifiable under *Terry*. The articulable facts supporting a reasonable belief that Long was dangerous are missing in this case and, therefore, the evidence found in the search of his car was properly suppressed.

4. The search for weapons was a pretext.

In *Sibron* v *New York*, 396 US 40, 46 (1968), the Court refused to uphold the search of a detainee that resulted in the discovery of heroine because the officer did not "seriously suggest that he was in fear of bodily harm and that he searched Sibron in self-protection to find weapons." The arresting officer was so little concerned about weapons that he did not pat down Sibron. Id at 65. Cf. *US* v *Rainone*, 586 F2d 1132, 1138 (7th Cir. 1978), which distinguished *Canal Zone* v *Bender*, 573 F2d 1329 (5th Cir. 1978), by noting that the investigating officers were so unconcerned about safety that they did not pat down the defendants before searching their car.

Deputies Howell and Lewis never seriously suggested that they were in fear of bodily harm from Long. He was cooperative at all times. He had made no threats. He did what he was told. Even after the knife was discovered, the deputies considered his detention a traffic stop (31a).

The deputies ignored tools, including a hammer and screwdriver, in their "search for weapons," concentrating instead on a barely-visible leather object under an armrest on the front seat (121a). Common sense should have indicated to the deputies that neither the knife nor other items in plain view in the car were contraband:

> "Contraband goods rarely are strewn across the trunk or floor of a car; since by their very nature such goods must be withheld from public view . . ." *US* v *Ross*, 102 S Ct 2157, 2170 (1982).

The ostensible reason for searching the car "for weapons" was to permit Long to get in it to find the

registration (35a), although after finding the knife the deputies may not have let Long back into the car under any circumstances (54a, 121a). There is also testimony that the car's papers may have been the *first* thing the deputies found in looking through the car (51a). They also believed that the registration was probably in the glove compartment where they could have easily obtained it without searching the car by asking Long where it was (40a-41a).

In light of the fact that they thought Long might be "under the influence of something" (25a) and that he acted like someone who might have "open intoxicants in the car," it seems more likely that their search was prompted by a desire to find contraband than it was to protect themselves.

II. THE SEARCH OF THE TRUNK WAS NOT A BONA FIDE INVENTORY SEARCH.

A. The propriety of the trunk search involves controlling issues of state law.

The Michigan Supreme Court never reached the question of whether the trunk search was a lawful inventory search. It never considered whether it was lawful as a search incident to arrest or as a probable cause search since neither of those grounds had been advanced by the prosecution, and Michigan law precludes consideration of issues not raised in the lower courts. *Dwelley* v *Tom McDonnell, Inc*, 334 Mich 229, 233; 54 NW2d 217 (1952); *Ford* v *Howard*, 59 MichApp 548, 551; 229 NW2d 841 (1975). Even if it is assumed that *US* v *Ross*, 102 S Ct 2157 (1982), should apply retroactively to cases in which the issue has not been preserved on appeal, the appropriate course for this Court to take, if it decides to consider the trunk search, would be to remand the issue to the Michigan Supreme Court for consideration of applicable state law.

If the Michigan Supreme Court had reached the merits of the trunk search, its decision would have been governed

by controlling state precedent. Arrest for a traffic offense would not, under Michigan law, have justified searching the Defendant or impounding his car, particularly without first having given him the opportunity to post bond. *People* v *Dixon*, 392 Mich 691; 222 NW2d 749 (1974); *People* v *7th District Judge*, 55 MichApp 471, 476; 222 NW2d 778, 781 (1974); *People* v *Garcia*, 81 MichApp 260; 265 NW2d 115 (1978); and *People* v *Cavitt*, 86 MichApp 59; 272 NW2d 196 (1978); lv den 406 Mich 945 (1979).

The fact that the Defendant had not produced registration did not give the officers right to suspect that the vehicle was stolen or to search or impound it. *People* v *7th District Judge*, supra; *People* v *Marshall*, 25 MichApp 376, 379; 181 NW2d 578 (1970).

Even if the deputies had probable cause to believe that Long had committed misdemeanor (possession of marijuana), they would not, under Michigan law, have been able to search his car without first securing a warrant, since the misdemeanor was not committed in their presence. *People* v *Lolley*, 113 MichApp 567; 317 NW2d 342, lv den 413 Mich 919 (1982).

A custodial arrest of Long for speeding would not have been appropriate under Michigan law. See MCLA 257.727; MSA 9.2427. Under Michigan precedent, discovery of marijuana in the interior of the car would not have justified a search of the trunk. *People* v *Hilber*, 403 Mich 312, 329; 269 NW2d 159 (1978). There was no lawful basis for impounding the car under Michigan law.

B. The trunk search was not an inventory search.

The deputies testified that they had an investigatory motive for searching the trunk and that they had no standard procedure for inventories. Deputy Howell testified at the Preliminary Examination as follows (15a-17a):

"A. . . . At this time I took my pocket knife and reached in and unlatched the latch.

Q. Why did you do that?

A. It was unusual circumstances to me. Also we check the vehicle to make sure there is nothing, you know, that's valuable.

Q. And you do that in limited circumstances where there is no other person to drive the vehicle away?

A. Yes, sir.

Q. Is that standard policy?

A. It's my policy, yes.

The Court: What's your policy? I kind of missed that when a truck went by.

Mr. Howell: Yes, sir, we don't—I think what the prosecutor is getting at is an inventory search. We do not have an inventory search.

The Court: Alright so you opened the trunk?

Mr. Howell: Personally, well I can't speak for the other officers, myself I check the vehicle to make sure there's nothing of value in there that can be later claimed . . .

The Court: Alright, fine, but why did you open the trunk?

Mr. Howell: Number one, because I already found marijuana, suspected marijuana in the interior of the car, there may have been more in the trunk. Secondly, I checked them for valuables. I do."

A primary reason for Deputy Howell's search of the car, including the trunk, was to discovery additional contraband. Howell testified that after arresting Defendant for possession of the marijuana discovered in the interior of the car, he "checked the interior of the vehicle for further contraband" (85a) and that he "searched the car for any more suspected narcotics . . ." (14a).

In deciding whether a search is an "inventory" search, motivation for the inspection is a significant factor. Searching a vehicle for contraband is not an inventory search. *People* v *Martin*, 368 NYS2d 342, 348 (NY App. Div., 1975).

Where, as here, no written list of the items inventoried is made, the process of inventorying stops when contraband is found (19a-20a), the search is conducted in places other than where valuables are usually stored (i.e., the glove compartment), no standard procedure is followed and the investigating officer testifies that the search was undertaken to find contraband, there can be no finding of an "inventory" search. *State* v *McDaniel*, 383 A2d 1174, 1180 (NJ Sup. Ct. App. Div., 1978).

The District Court, the Circuit Court and the Court of Appeals upheld the search of the trunk as an "inventory search." All three Courts relied on *South Dakota* v *Opperman*, 428 US 364 (1976).

The reliance on *Opperman* was misplaced. In *Opperman*, *id* at 376, a plurality of the Court held that the inventory search of an automobile "following standard police procedures" was not "unreasonable" within the meaning of the Constitution. The Court carefully emphasized that the search was conducted in accordance with standard procedures, using a standard form and departmental routine. The Court referred to "standard" procedures at least five times in its opinion.

Opperman reviewed *Cady* v *Dombrowski*, 413 US 433 (1973) saying:

> "The Court carefully noted that the protective search was carried out in accordance with *standard procedures* in the local police department, . . . a factor tending to insure that the instrusion would be limited in scope to the extent necessary to carry out the cartaking function." (Emphasis in original) *South Dakota* v *Opperman*, 428 US at 374-375.

There was no suggestion that "this standard procedure . . . was a pretext concealing an investigatory police motive." *Id* at 376.

In this case, there were no guarantees that Deputy Howell's intrusion would be limited in scope. He had an investigatory motive. He was not bound or guided by any departmental policy. He made no written report of his actions. He could not describe the things he had supposedly inventoried for his own protection against claims of theft (26a). He sought no approval or authority for his actions. There was nothing "standard" about his procedure.

The rationale of "inventory searches" was discussed in *US* v *Chadwick*, 433 US 1 (1977). The Court said that in some automobile seizures, a warrantless search is permissible because:

> "Absolutely secure storage facilities may not be available, and the size and inherent mobility of a vehicle makes it susceptible to theft or intrusion by vandals." (Citations omitted) Id at 13 n. 7.

In this case, "absolutely secure" storage facilities were available. The care was secured in the basement of the Sheriff's garage (53a, 87a-88a, 116a-117a). The arresting officers were so certain that the car was safe from theft or intrusion by vandals that they left the 75 pounds of marijuana they had discovered in the trunk of the car (53a, 87a-88a, 116a-117a). Cf. *State* v *McDougal*, 228 NW2d 671, 678 (Wis. 1975).

Unlike Opperman, this Defendant was available to arrange to have the car transported. Nearly two hours went by while the deputies and the Defendant waited at the scene of their encounter for a tow truck to arrive (84a-85a). In that time, alternative arrangements could have been tried or the deputies could have sought a warrant.

C. A lawful inventory can only follow a lawful impoundment.

Many courts have held inventory searches to be a violation of constitutional rights when alternatives to impoundment are available or when the police fail to investigate alternatives.

State v *Hardman*, 567 P2d 238, 240 (Wash. Ct. App., 1977), held that the state must prove that no alternatives to impoundment exist before an inventory search will be upheld.

In *State* v *Bales*, 552 P2d 688, 690 (Wash. Ct. App., 1976), the Court said:

> "Impoundment of a citizen's vehicle following his or her arrest on a traffic charge is inappropriate when reasonable alternatives to impoundment exist."

State v *Slockbower*, 397 A2d 1050, 1053 (NJ, 1979), summarized cases from "a substantial and growing minority of jurisdictions" holding that impoundment and inventorying are impermissible procedures absent:

> "a factual showing of substantial police need, in the light of the consitutional regard for the privacy interests of automobiles' drivers . . ."

David Long was never asked if he wanted the car towed away by a wrecker of his choosing, or if he knew of someone who could be called to take the car away. He was not given the option of parking the car next to the roadway or in an appropriate nearby place. The car was not evidence and no Michigan statute authorized its impoundment. Instead, nearly two hours went by while all concerned waited for the tow truck and the vehicle was impounded.

The trunk search was not a valid inventory search.

III. THE DECISION BELOW IS SUPPORTED BY AN ADEQUATE STATE GROUND.

The Court should dismiss the Writ of Certiorari as improvidently granted. The decision of the Michigan Supreme Court is based on state law. Even if the Court should determine that the Michigan Supreme Court's interpretation of federal law was incorrect, its decision in this case would amount to well-considered dictum. Cf. *South Dakota* v

Opperman, 428 US 364 (1976); *State* v *Opperman*, 247 NW2d 673 (SD, 1976) (after remand).

> "[W]here the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment." *Fox Film Corp* v *Muller*, 296 US 207, 210 (1935).

The Michigan Supreme Court expressly grounded its decision on both the state and federal constitutions. See *People* v *Long*, 413 Mich 461, 471 n.4, 473; 320 NW2d 866, 869 n.4, 870 (1982). *People* v *Secrest*, 413 Mich 521, 525; 321 NW2d 368 (1982), noted differences in wording between the state and federal constitutional provisions regarding searches and seizures. The Court said:

> "As a result, we have imposed a higher standard under the state provision than the federal when the item seized is not one within the proviso of the third sentence of art 1, §11."

The proviso of the third sentence of Article 1, §11 of the Michigan Constitution prohibits application of the exclusionary rule to, among other things:

> "Any narcotic drug . . . seized by a peace officer outside the curtilage of any dwelling house . . ."

This case does not come within that proviso since marijuana is not a narcotic drug under Michigan law. MCLA 333.7107; MSA 14.15(7107).

It is true, but unremarkable, that the Michigan Supreme Court looked to federal case authority in its analysis of the state constitutional question. It does so traditionally. See *People* v *Secrest*, supra, at 525. However, unlike the situation presented to this Court in *Delaware* v *Prouse*, 44 US 648, 651-653 (1979), the state constitution has not been

interpreted as coextensive with the federal constitution. Examples of the greater protection afforded to citizens by the Michigan Constitution abound.

The Michigan Constitution prohibits warrantless participant monitoring of telephone conversations. *People* v *Beavers*, 393 Mich 554; 227 NW2d 511, cert den 423 US 878 (1975). Warrantless participant monitoring is permitted under the federal Constitution. *US* v *White*, 401 US 745 (1971).

The subjective test of entrapment is followed under the U.S. Constitution. *US* v *Russell*, 411 US 423 (1973). Michigan follows the objective test. *People* v *Turner*, 390 Mich 7, 19; 210 NW2d 336 (1973).

The Michigan Constitution's double jeopardy provision bars prosecutions by "dual sovereignties" for the same crime. *People* v *Cooper*, 398 Mich 450; 247 NW2d 866 (1976). Compare *Bartkus* v *Illinois*, 359 US 121 (1959).

The automatic standing rule of *Jones* v *US*, 362 US 257 (1960), repudiated in *US* v *Salvucci*, 448 US 83 (1980), has apparently not been abandoned in Michigan. See *People* v *Nabers*, 103 MichApp 354, 375; 303 NW2d 205, 214, rev'd on other grounds, 411 Mich 1046; 309 NW2d 187 (1981) and *People* v *Smith*, 118 MichApp 366, 373, 377; 325 NW2d 429 (1982).

In *People* v *Wallach*, 110 MichApp 37, 70-71 n.8; 318 NW2d 387 (1981), the Court said:

> "Michigan consitutional law in many ways provides more stringent standards to safeguard the rights of the individual accused than do our sister states and the federal system."

See also *People* v *Chernowas*, 111 MichApp 1, 4; 314 NW2d 505 (1981).

There is no reason to believe that the Michigan Supreme Court:

> "felt compelled by what it understood to be federal constitutional considerations to construe . . . its own law in the manner it did." *Delaware* v *Prouse*, 440 US 648, 653 (1979).

At the very least, the question of the applicability of state law is uncertain enough that the Court should remand for clarification as to the ground upon which the judgment rested. Cf. *California* v *Krivda*, 409 US 33, 35 (1972).

CONCLUSION

No exigent circumstance justified the warrantless search of Long or his car. The only rationale advanced for these searches was the protective search rationale of *Terry* v *Ohio*, 392 US 1 (1968). The presence of an item in the car, not contraband, that could be used to hurt the officers did not justify a search of the car absent an objective basis for believing that the Defendant presented a danger to the officers. The officers' actions and testimony show they did not regard Long as a danger.

Further extension of *Terry's* exception to the warrant requirement is not justified as a matter of policy or on the facts of this case. The Michigan Supreme Court's decision should be affirmed.

Because the Michigan Supreme Court did not reach any other issue in the case, it presents an inappropriate vehicle for this Court's determination of any issue other than whether the scope of *Terry* should be expanded.

The Court lacks jurisdiction because the Michigan Supreme Court's decision was based on an adequate state ground. The Court should either remand for a clarification of the basis of the Michigan Supreme Court's decision or dismiss the Writ of Certiorari as improvidently granted.

Respectfully submitted,

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